Supreme Court, U.S.
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No. 00-1835

In The

Supreme Court of the United States

ADOUDA ADJIRI,

Petitioner,

v.

EMORY UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the court of appeals' summary affirmation of the district court's legal conclusion that, due to her failure to administratively exhaust her race and national origin claims, her failure to make a *prima facie* showing of hostile work environment sexual harassment, sex discrimination, or retaliation, and her failure to establish pretext, Petitioner did not establish a violation of Title VII.

CORPORATE DISCLOSURE

Respondent Emory University is a non-profit educational institution and has no publicly traded parent or subsidiary companies.

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OPINIONS BELOW

The Eleventh Circuit's per curiam summary affirmation of the district court's judgment is unpublished. (Pet. App. A) The district court's Order and the Magistrate Judge's Report and Recommendation are also unpublished. (Resp. App. 1a); (Resp. App. 1b) The judgment of the district court entered by the district court clerk on March 24, 1999 is also unreported, but appears at (Pet. App. B).

JURISDICTION

The clerk entered the judgment of the Eleventh Circuit on March 24, 1999 (Pet. App. B), and the Eleventh Circuit denied Petitioner's timely petition for rehearing on March 8, 2001. (Pet. App. C) Petitioner filed the petition for certiorari on June 11, 2001 and thus perfected this Court's discretionary jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. The first relevant section is 703(a)(1), which provides in pertinent part:

It shall be an unlawful employment practice for an employer –

> (1) . . . to discharge any individual, or otherwise discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, . . . sex, or national origin. . . .

42 U.S.C. § 2000e-2(a)(1).

The following section of Title VII is also relevant and provides that:

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . .

42 U.S.C. § 2000e-5(e)(1).

Section 704(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

STATEMENT OF THE CASE

This is a routine disciplinary discharge case under Title VII. Respondent hired Petitioner, a white female who originates from Algeria, on January 1, 1996 as a Lead Research Specialist in its Department of Pathology and Laboratory Medicine. (Resp. App. 2b) About six months

later, Respondent discharged Petitioner for her inability to get along with her co-workers, insubordination, and job abandonment. (Resp. App. 5b, 17b) At the summary judgment stage, Respondent produced the testimonial admissions of Petitioner which confirmed the legitimacy of the reasons for Petitioner's termination. (Resp. App. 3b)

Petitioner acknowledged in her deposition testimony that she had engaged in juvenile tactics such as placing a cardboard barrier between her workspace and that of another laboratory technician and putting her fingers in her ears so that she could block her co-worker's attempts to speak with her. (Resp. App. 3b) Petitioner also admitted that she refused to speak with her direct supervisor about a disagreement between her and her co-workers, that she hung up the telephone on her supervisor, and that later she even refused to return to work because she was "on strike" (Resp. App. 3b, 4b); yet, Petitioner claimed that she had been discharged for discriminatory reasons.

1.

Petitioner asks the Court to grant certiorari because she believes that Respondent "confessed" its fault for her termination before the Georgia Department of Labor (DOL) in the administrative proceedings concerning her efforts to obtain unemployment compensation benefits. Petitioner ignores the fact that she was initially disqualified from receiving unemployment benefits, because Respondent had demonstrated by a preponderance of the evidence that Petitioner was "discharged for failure to

obey orders, rules, or instructions, or a failure to discharge the duties for which employed." (Pet. App. D)

Petitioner also fails to note that Respondent "specifically declined to challenge her appeal of the preliminary determination" disallowing unemployment compensation benefits. (Pet. App. D) Because Respondent did not challenge the appeal, the hearing officer determined that Respondent did not meet its burden to demonstrate that Petitioner was discharged under disqualifying conditions.[1]

Since the purpose of the state administrative proceeding was to determine Petitioner's eligibility for unemployment compensation and not to test Petitioner's discrimination complaints, the administrative hearing officer's decision to award Petitioner benefits had no preclusive or determining effect.[2] The state administrative decision is not a judicial admission that Respondent discharged Petitioner because of her race, sex, national origin, or retaliatorily, and it did not raise an inference of discrimination. It is simply one fact among many. Thus, Petitioner's first reason for her request for certiorari is not an appropriate one for the exercise of this Court's discretionary jurisdiction.

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[1] *See* O.C.G.A. § 34-8-194(2)(A) (1996) (Georgia's Employment Security statute places the burden of proof of just discharge or suspension for cause upon the employer).

[2] *See Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641 (11th Cir. 1987) (declining to grant preclusive effect to the Georgia Employment Security Agency decision).

2.

Petitioner next contends that certiorari should be granted because the district court improperly overlooked the decision of Georgia DOL and Respondent's so-called "confession" of culpability. This notion has no validity. The district court and the court of appeals considered the *entire record.* (Pet. App. A); (Resp. App. 1a) Therefore, Petitioner's second reason for granting the writ of certiorari is equally uncompelling.

3.

Petitioner's final reason for this petition is based on her personal opinion that summary judgment should be eliminated in employment discrimination cases. Like her other justifications for this petition, Petitioner's partisan opinion about the application of Fed. R. Civ. P. 56 to employment cases does not support the grant of certiorari.

In 1986, this Court decided *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). These cases confirm the application of summary judgment proceedings to all cases, so that "factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327. The purpose behind Rule 56 was served in this case.

In *Celotex*, this Court stated that "[s]ummary judgment procedure is properly regarded not as a disfavored

procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.* at 327. Contrary to Petitioner's entreaty, Rule 56 has particular applicability to employment cases where unhappy employees and their advocates often attempt to use the anti-discrimination laws to advance notions of industrial justice foreign to our system.[3]

Summary judgment is an important and necessary procedure, but not without checks and balances. The district courts remain subject to plenary appellate review, as here. Ultimately, other than her personal dissatisfaction with the result before the lower courts, Petitioner has set forth no reason to cease the use of summary judgment procedure in employment discrimination cases.

4.

After a *de novo* review, the Eleventh Circuit affirmed the district court decision that Petitioner had not administratively exhausted her race and national origin claims, and that she had failed to make a *prima facie* showing of hostile work environment – sexual harassment, sex discrimination, or retaliation. Petitioner fails to address

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[3] *See Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572-73 (7th Cir. 1989) (in which Judge Posner observed "[t]he workload crisis of the federal courts, and realization that [discrimination cases are] occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law").

these issues and thus fails to identify any error warranting relief from this Court.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit's affirmation of the district court judgment is correct. It is consistent with this Court's decisions requiring the exhaustion of administrative remedies, *Brown v. General Services Admin.*, 425 U.S. 820 (1976), and establishing the order and allocation of proof under Title VII. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

I. This Ordinary Case Holds No Importance Beyond the Parties.

The district court granted Respondent's motion for summary judgment, concluding that Petitioner had failed to establish violations of Title VII with her allegations of gender, race, and national origin discrimination, sexual harassment, and retaliation. The district court ruled that Petitioner had not exhausted her administrative remedies, because although Petitioner had filed a charge of discrimination with the Equal Employment Opportunity Commission, her charge did not include allegations of race and national origin discrimination.

The district court also ruled that Petitioner had not established a claim of sexual harassment, because she offered no evidence to demonstrate that the conduct of which she complained was severe or pervasive; that she

had not established a *prima facie* case of sex discrimination; and that she had not established that Respondent's employment reasons were pretexts for sex discrimination.

The district court ruled that Petitioner had not established a *prima facie* case of retaliation and had not refuted Respondent's legitimate, non-retaliatory reasons for her discharge. The Eleventh Circuit affirmed.

Thus, this case is most ordinary, involving routine issues, routine facts, and a routine application of well-established law. This case is of importance only to the parties, and Petitioner's quest for her own brand of individual justice does not warrant the exercise of this Court's extraordinary judicial discretion. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923) (in which Chief Justice Taft stated that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . . ")

II. The Courts Are Not in Conflict.

This Court has exercised its certiorari jurisdiction when the decisions of the courts conflict, either among the United States courts of appeals, or between the courts of appeals and the highest state courts. *See, e.g., Martinez v. Court of Appeal of California*, 528 U.S. 152, 155 (2000) ("We granted certiorari because Martinez has raised a question on which both state and federal courts have expressed conflicting views"); *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts

among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law"); *Stevens v. Department of the Treasury*, 500 U.S. 1 (1991) (granting certiorari where the circuits were divided on the issue of whether a federal employee, who elects agency review of an age discrimination claim, must exhaust his administrative remedies before bringing a civil action).

There is no circuit conflict here; there is no federal-state conflict here. The order and allocation of proof in Title VII disparate treatment cases were established by this Court in *McDonnell Douglas, supra*, and continue to be followed by all of the Circuits, including the Eleventh Circuit.[4] Thus, not only is this case ordinary, it is legally insignificant since the applicable law is well-settled, having been resolved for years.

III. Certiorari Is Not Warranted to Review Evidence.

Petitioner asks the Court to grant the writ so the Court can state the record to find what she hopes is evidence illustrating error below. Petitioner also hopes that the Court will agree that she was insulted and harassed while working in Respondent's Pathology Department.

It has been long recognized, however, that this Court's certiorari jurisdiction is not invoked to review

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[4] *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001) (stating that "[a]bsent direct evidence, a plaintiff may prove intentional discrimination through the familiar *McDonnell Douglas* paradigm").

evidence. *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). Petitioner's request for a factual review of the record is foreclosed by long-standing historical precedent.

CONCLUSION

For the preceding reasons, the Court should deny the petition for a writ of certiorari to the judgment of the Eleventh Circuit.

Respectfully submitted,

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July 11, 2001

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DR. ADOUDA ADJIRI, Plaintiff,	)	
v.	)	CIVIL ACTION
EMORY UNIVERSITY, Defendant.	)	NO. 1:96-CV-3038-RWS

ORDER

(Filed Mar. 24, 1999)

This case is before the Court for consideration of the Report and Recommendation [55-1] of Magistrate Judge John E. Dougherty recommending the granting of Defendant's Motion for Summary Judgment. Plaintiff has filed objections to the Report and Recommendation. After considering the entire record, the Court enters the following Order.

In her objections to the Report and Recommendation, Plaintiff points out that the Magistrate Judge had missed the fact that Dr. Austin's wife was not present for the entire conference in Taos, New Mexico. Dr. Austin booked a two room, one bath suite for himself, his wife, and Plaintiff to share. Dr. Austin and his wife slept in the bedroom, and Plaintiff slept in the other room. The conference lasted a week, and Plaintiff's wife was only present for the weekend. The arrangement understandably made Plaintiff very uncomfortable. However, Plaintiff acknowledges that Dr. Austin never touched her nor

mentioned sex to her nor made any type of sexual overture to her. Plaintiff perceived Dr. Austin's having arranged these accommodations as having created "the space for sexual activity." Deposition of Plaintiff p. 94.

While the Court appreciates and understands Plaintiff's discomfort with the accommodations in Taos, this modification of the factual findings by the Magistrate Judge does not alter the soundness of his ultimate conclusion. After reviewing the Report and Recommendation and the objections thereto, the Court approves the Report and Recommendation and adopts it as the Order of this Court with the exception of the modification of the factual findings stated above.

Accordingly, Defendant's Motion for Summary Judgment [49-1] is hereby **GRANTED**.

SO ORDERED, this 23rd day of March, 1999.

/s/ Richard W. Story
RICHARD W. STORY
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

DR. ADOUDA ADJIRI Plaintiff, v. EMORY UNIVERSITY Defendant.	)	CIVIL ACTION NO. 1:96-CV-3038-RWS

MAGISTRATE JUDGE'S ORDER AND REPORT AND RECOMMENDATION

Presently before the court are two motions filed by the defendant in this action. On July 9, 1998, Defendant Emory University filed a Motion for Summary Judgment in this court. Docket Entry [49]. Additionally, on September 17, 1998, defendant Emory University filed a Motion to Strike [53-1] plaintiff's reply to defendant's reply brief in support of its Motion for Summary Judgment. Docket Entry [53].

Defendant's Motion for Summary Judgment

Plaintiff filed the instant action alleging gender and racial discrimination, sexual harassment, and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended. Defendant asserts that it is entitled to summary judgment as plaintiff has failed to establish a *prima facie* case as to any of her claims.

I. Statement of Facts

Defendant Emory University hired plaintiff on January 1, 1996 as a Lead Research Specialist in the Department of Pathology and Laboratory Medicine to work in the laboratory of Dr. Garth Austin at the Veterans Affairs (VA) Medical Center. (Undisputed). Plaintiff is of Algerian descent and considers her race to be white. Dr. Austin is Chief of Clinical Pathology at the VA and an Associate Professor of Pathology at Emory University. (Affidavit of Dr. Garth Austin, hereinafter referred to as ("Austin Aff.", ¶ 1). In January 1996, Austin's research staff consisted of Weiguo Zhao, a Lead Research Specialist, and Jipu Lu, a VA Lab Technician. Zhao obtained a master's degree in medicine in China, performed research with the Center for Disease Control, and worked with Dr. Austin for three years. (Affidavit of Weiguo Zhao, hereinafter referred to as "Zhao Aff.", ¶ 2). Lu was a professor of chemistry in China, graduated with a master's degree in science from Georgia State University, and worked with Austin since October 1995. (Affidavit of Jipu Lu, hereinafter referred to as "Lu Aff.", ¶ 2).

Within the first few weeks of her employment, plaintiff demonstrated difficulty interacting with her coworkers, including becoming impatient with Zhao. (Zhao Aff., ¶ 4). Plaintiff deliberately ignored Zhao's advice regarding the laboratory protocol and instead followed her own procedures. (Deposition of Adouda Adjiri, hereinafter referred to as "Plaintiff's Depo.", p. 30). In attempting to resolve the differences among his staff, Dr. Austin was told by plaintiff that plaintiff would never be friendly towards Zhao. (Austin Aff., ¶ 5). In fact, from that point on, plaintiff harbored great hostility toward

Zhao and demonstrated this contempt by placing a cardboard barrier between their respective spaces in the laboratory. (Plaintiff's Depo., p. 56). Additionally, plaintiff placed fingers in her ears so that she could block Zhao's attempts to speak with her. (Plaintiff's Depo., pp. 59-60).

Plaintiff again demonstrated her unhappiness with her co-workers in an incident which occurred on April 11, 1996 in which plaintiff was playing a computer game and listening to a radio as her co-workers worked nearby within the lab. (Plaintiff's Depo., p. 110). When Dr. Austin called plaintiff to discuss the disagreement, plaintiff refused to speak with Dr. Austin and ultimately hung up the phone. (Plaintiff's Depo., pp. 106, 112).

The next day, on April 12, plaintiff had another encounter with Zhao and she ultimately called the VA police department in order to file a report. After these arguments with Zhao, plaintiff decided to stop communicating with him. (Plaintiff's Depo., p. 155). Subsequently, Zhao informed Dr. Austin that he could no longer work with plaintiff. As a result, Dr. Austin offered to help plaintiff look for another position in order to alleviate the new found tension within the laboratory. (Plaintiff's Depo., p. 126).

Zhao had concerns with both plaintiff's personal disruptions as well as with the quality of her work. On June 20, Zhao wrote a letter to Dr. Austin citing specific instances where plaintiff's experiments were unsuccessful due to her lack of basic scientific knowledge as well as her failure to observe basic laboratory procedures. (Zhao Aff., ¶ 11). After receiving Zhao's letter. Dr. Austin

expressed concern to Mr. Tony Laracuente, VA Administrative Officer for Research and Development. Because Mr. Laracuente was concerned with the performance of the scarce medical resources contract and its impact on Dr. Austin's VA merit award, he met with Dr. Austin, plaintiff, Zhao, and Pam Mosely, VA Employee Relations Specialist, in order to mediate the situation. (Affidavit of Mr. Tony Laracuente, hereinafter referred to as "Laracuente Aff.", ¶ 4). During the meeting, plaintiff blamed all of the problems in the laboratory on Zhao. As a result of plaintiff's allegations, Zhao informed everyone at the meeting that he could no longer work under such circumstances and he immediately began looking for another job. (Zhao Aff., ¶ 12).

Plaintiff had another altercation with a co-worker on July 10, in which plaintiff taunted Ms. Lu until Lu left the laboratory in tears. Dr. Austin discussed the situation with plaintiff and suggested that the hostility in the laboratory needed to be resolved, and recommended that plaintiff take the next two days off in order to put the episode behind her. (Austin Aff., ¶ 17).

On July 15, plaintiff did not return to work, but instead left a voice mail message for Dr. Austin stating that she would not come back until the laboratory was made satisfactory for her return. (Plaintiff's Depo., p. 194). Plaintiff stopped by Dr. Austin's office later in the week threatening that she was "on strike". (Austin Aff., ¶ 18). Plaintiff never returned to work in the laboratory after her July 10 disagreement with Lu. (Plaintiff's Depo., p. 144). On July 19, plaintiff informed Dr. Austin by written letter that she was "on strike until the minimum

at least, of safety and respect is guaranteed." (Defendant's Exhibit 7). After Ms. Carol McMurtray, Business Manager for the Department of Pathology and Laboratory Medicine, was informed that plaintiff did not return to work as expected, she exercised her authority to terminate plaintiff's employment based on her unwillingness to interact with her colleagues, insubordination to her supervisor, and job abandonment. (McMurtray Aff., ¶ 8). On July 22, Ms. McMurtray prepared a written letter to the plaintiff to that effect. (Plaintiff's Depo., Defendant's Exhibit 13).

Plaintiff's Allegations of Sexual Harassment

Plaintiff complains that she suffered sexual harassment by Zhao when he repeatedly insulted her and placed restrictions upon her work. (Complaint ¶ 4). Specifically, plaintiff asserts that Zhao gave her the responsibility of ordering the supplies for the laboratory, prevented her use of the laboratory UV light and chemical hood, and interrupted her telephone conversations. (Plaintiff's Depo., pp. 27, 51-52). Zhao asserts that he neither had the authority to assign plaintiff's lab duties, nor did he prevent her from utilizing common laboratory equipment. (Zhao Aff., ¶ 9). Plaintiff also complains that Dr. Austin was sexually harassing because he winked at her, made remarks about her dress, hats, and hair, volunteered to drive her home, asked her questions about her private life, and took her to dinner once. (Complaint ¶ 8). Additionally, plaintiff complains that Dr. Austin sexually harassed her by booking only one room for a medical conference in New Mexico which plaintiff attended along with Dr. Austin and his wife. At the time plaintiff

announced the travel arrangements, plaintiff offered no objections. (Austin Aff., ¶ 8). At the conference, plaintiff slept on a pull out bed in an outer room, and Dr. Austin and his wife slept in a bed in a separate room. In her deposition, plaintiff stated that Dr. Austin never touched plaintiff or solicited any sexual favors at any time. (Plaintiff's Depo., pp. 94-95). In fact, after she returned from the conference, plaintiff stated that Dr. Austin had been a "perfect gentleman." (Affidavit of Patricia Bidgood, hereinafter referred to as "Bidgood Aff.", ¶ 2).

On July 24, 1996, plaintiff filed an internal grievance disputing her discharge and again claimed that she suffered harassment by her co-workers and sexual harassment by her supervisor. Plaintiff did not include any claims of her race or national origin discrimination in her July 24 grievance form. (Plaintiff's Depo., Exhibit 14). On August 27, 1996, plaintiff filed a discrimination charge with the EEOC alleging only sex discrimination and retaliation. Plaintiff's charge and supporting affidavit filed with the EEOC do not contain any allegations of race and/or national origin discrimination.

II. Conclusions of Law

A. Summary Judgment Standard

At the summary judgment stage, the court must examine all evidence in the light most favorable to the non-moving party and resolve all reasonable doubts in his favor. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077 (11th Cir. 1990). A motion for summary judgment shall be

granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there was no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

On a motion for summary judgment, "[t]he moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Once the movant has pointed out the nonexistence of any genuine issue of material fact, it is up to the plaintiff to produce some evidence in support of her claim. *Velten v. Lippert*, 985 F.2d 1515 (11th Cir. 1993). Mere conclusory allegations of harassment are not enough to withstand a motion for summary judgment. *Carter v. Miami*, 870 F.2d 578, 585 (11th Cir. 1989). In other words, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). An issue is not genuine if unsupported by evidence or if created by evidence that is "merely colorable" or "not significantly probative." *Id.* at 250. Likewise, a fact is only material if designated by controlling substantive law as an essential element of plaintiff's case. *Id.* at 248.

If neither party can prove the existence or nonexistence of an essential element of a claim, summary judgment will be granted if the movant shows that the plaintiff will be unable to meet her burden of proof at

trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). The movant's burden therefore requires a " 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.*

A. Exhaustion of Local Remedies

Defendant Emory University moves for summary judgment on plaintiff's race and national origin discrimination claims because it contends that plaintiff has not exhausted her administrative remedies. Although she did file an EEOC charge, it is undisputed that she only alleged gender discrimination and sexual harassment. In response, plaintiff argues that the omission came as a result of her *pro se* status.

Under Title VII, a plaintiff must first exhaust his administrative remedies before bringing suit in federal court. *Brown v. General Svcs. Adminis.*, 425 U.S. 820, 835, 96 S. Ct. 1961, 48 L. Ed.2d 402 (1976); *Moore v. Alabama State Univ.*, 864 F.2d 103, 104 (11th Cir. 1989). In other words, it is mandatory for plaintiff to file a charge of discrimination with the EEOC prior to seeking judicial relief. The Fifth Circuit explained the purposes behind this requirement:

> The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is not filed as a preliminary to a lawsuit. On the contrary, the purpose of the charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed, the Commission carries out its investigatory function and attempts to obtain

> voluntary compliance with the law. Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of court action. . . . Within this statutory scheme, it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can *reasonably be expected to grow out of the charge of discrimination.*

Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970) (emphasis added). Courts have recognized an exception to the exhaustion requirement for claims of discrimination which arose prior to the filing of the EEOC charge but were not raised in the charge. In that instance, plaintiff will be excused from the exhaustion requirement if he can show that the unexhausted claim is "reasonably related" to the claims raised in his EEOC charge. *Sanchez*, 431 F.2d at 466; *Evans v. United States Pipe & Foundry Co.*, 696 F.2d 925, 928 (11th Cir. 1983); *Boge v. Ringland-Johnson-Crowley Co.*, 976 F.2d 448 (8th Cir. 1992) (citing *Anderson v. Block*, 807 F.2d 145, 148 (8th Cir. 1986)); *Brown v. Hartshorne Public Sch. Dist.*, 864 F.2d 680, 682 (10th Cir. 1988). If the subsequently raised claim does not meet this test, the district court is precluded from hearing it.

In *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980),[1] the plaintiff filed a charge for discrimination in which she alleged that defendants had failed to hire her for a full-time professorship because of her gender. She later filed an amended

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

charge, alleging that defendants also discriminated against her based on her race when they denied her the professorship. To avoid being time-barred, plaintiff argued that her amended charge related back to her original charge. While recognizing that EEOC charges must be "liberally construed because charging parties usually are unfamiliar with the technicalities of formal pleadings and are not assisted by an attorney," the court determined that plaintiff's allegations of racial discrimination did not relate or grow out of her earlier allegations of gender discrimination. *Id.* at 483 (citing *Tillman v. City of Boaz,* 548 F.2d 592, 596 (5th Cir. 1977); *Sanchez v. Standard Brands,* Inc., 431 F.2d 455, 462-63 (5th Cir. 1970)). *Accord Buffington v. General Time Corp.,* 677 F. Supp. 1186, 1194 (M.D. Ga. 1988) (age discrimination claim not reasonably related to race discrimination claim); *Thornton v. Georgia Power Co.,* 31 F.E.P. 901 (N.D. Ga. 1981) (sex discrimination claim not reasonably related to race discrimination claim); *Whittaker v. Department of Human Resources,* 86 F.R.D. 689 (N.D. Ga. 1980) (same). The undersigned finds that plaintiff's claim of race and national origin discrimination is not "reasonably related" to her claims of gender discrimination and sexual harassment raised in her EEOC charge. Accordingly, the undersigned finds that defendant's Motion for Summary Judgment should be GRANTED as to plaintiff's race and national origin discrimination claims.

B. Plaintiff's Hostile Environment Claim

Plaintiff has also included a claim of sexual harassment. However, defendant maintains that plaintiff's claim must fail as the record is absent of any conduct which is

sufficiently pervasive or severe so as to alter the plaintiff's working environment or that defendant was aware of such conduct and failed to take prompt, remedial action.

A defendant is liable under Title VII if the employee has been discriminated against on the basis of race or sex, and that discrimination has created a hostile or abusive working environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986). In *Harris v. Forklift Sys.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed.2d 295 (1993), the Supreme Court explained that the relevant inquiry looks at whether the actions of the defendants altered the working condition to such an extent that a reasonable person would find the atmosphere hostile and abusive and to such an extent that the plaintiff subjectively perceived the atmosphere as such. *Harris*, 126 L. Ed.2d at 302. The Court set forth factors which are to be examined in determining whether abuse in the workplace rose to this standard. The Court held that:

> These may include the *frequency* of the discriminatory conduct; its *severity*; whether it is *physically threatening or humiliating*, or a mere offensive utterance; and whether it *unreasonably interferes* with an employee's work performance.

Id. at 302-03 (emphasis added). The Court held that although the psychological effect on an employee may be considered, it is only one factor in the analysis, and that if the environment would reasonably be perceived as hostile and abusive, a showing of serious psychological harm

is not necessary. *Id.* In other words, the court must examine the totality of the circumstances, looking at the combined effect of all of the incidents. *Id.; Edwards v. Wallace Community College,* 49 F.3d 1517, 1521-1522 (11th Cir. 1995); *Vance v. Southern Bell Tel. & Tel. Co.,* 863 F.2d 1503, 1510-11 (11th Cir. 1989).

When the employee seeks to hold the employer liable for harassment by her supervisor, the employee must prove an additional element, specifically that the employer knew or should have known that the harassment was occurring, and that the employer failed to take prompt remedial action. In the recent case of *Faragher v. City of Boca Raton,* 117 S.Ct. 2275 (1998), the Court stated the following:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises of two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. at 2285. Thus, the imposition of vicarious liability applies only in those situations where a "supervisor's harassment culminates in a tangible employment action

such as discharge, demotion, or undesirable reassignment." *Id.*

Defendant argues that plaintiff cannot satisfy her *prima facie* burden because she does not satisfy the *Harris* Test. Initially, defendant maintains that the conduct about which plaintiff complains does not rise to the sufficient level of pervasiveness to be actionable. In *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995), the Court stated that a few isolated instances of racial animus do not rise to the level of frequency to create a workplace permeated with racial hostility. In that case, the court held that seven racial incidents or remarks in seven months is not pervasive enough to rise to the level of harassment.

In the instant case, plaintiff offers no evidence to demonstrate that the conduct which she complained about was severe or pervasive. In support of her claim, plaintiff cites only that Dr. Austin winked at her, complimented her hair and clothing, invited her to dinner once, and booked one hotel room in which Dr. Austin and his wife slept together during a scientific conference. Accordingly, defendant also maintains that the conduct complained of was not sufficiently severe in nature. Instead, defendant asserts that the specific instances of alleged harassment are not even offensive. Such general references alleged by plaintiff, occurring infrequently and in isolated circumstances, do not rise to the level of hostility or severity as anticipated by the Supreme Court. *Harris*, 510 U.S. at 17. As stated in *Harris*, "the 'mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of

employment to implicate Title VII." *Id.* at 21. Here, plaintiff has portrayed an environment in which she was subjected to several compliments and a winking of the eye. Further, plaintiff bases her claim, in part, on the fact that Dr. Austin booked only one room for a conference which he attended with is wife. Accordingly, the court finds that plaintiff has not met her burden to establish the severity of defendant's conduct.

In *Ealey v. Dekalb County Hospital Auth.*, 59 Fair Empl. Prac. Cases (BNA) 1803 (N.D. Ga. 1988), the court found that the utterance of racial epithets by a co-employee does not demonstrate a hostile employment environment. Also in the case of *Robertson v. Georgia Dept. of Corrections*, 725 F.Supp. 533 (S.D. Ga. 1989), in which a black employee's allegations that he was moved to an inferior office, subjected to racially demeaning jokes, that specific supervisors called him "affirmative action boy" and "ole boy" were insufficient to make out a racial harassment claim. The *Robertson* case also noted that "[t]o recognize a cause of action based upon a discriminatory work environment, the court cautioned that the case should not be 'interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Title VII." *Id.* at 538 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). Plaintiff offers no case law in her reply brief to diminish the strength and persuasiveness of defendant's argument as to plaintiff's hostile working environment claim. Additionally, there is no evidence presented by plaintiff to suggest a level of conduct which surpasses that of the defendant in the *Robertson* case which would establish a hostile environment. While this

court certainly does not condone or encourage insolent, discourteous behavior among co-workers, the undersigned finds that the conduct described of in this case fails to rise to the level of conduct proscribed by Title VII. Accordingly, the plaintiff has failed to establish any element of her *prima facie* case for hostile environment employment discrimination. The court therefore finds that the plaintiff's case must fail as to the claim of the existence of a sexually hostile working environment.

C. Plaintiff's Discrimination Claim

Plaintiff has also asserted a claim of gender discrimination against the defendant. Defendant contends, however, that plaintiff's claim must fail as she has neglected to even attempt to establish a prima *facie case* of discrimination.

A Title VII plaintiff may attempt to show discriminatory intent by either direct or indirect evidence. Because plaintiff has not presented any direct evidence with regard to her reduction in commission, the court will apply the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). Under the *McDonnell Douglas* framework, the plaintiff has the burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. To establish a *prima facie* case of disparate treatment with regards to a pay disparity, plaintiff must show the following: (1) he is a member of a protected class; (2) an adverse employment action was taken against him; (3) similarly situated employees who were not members of his class were not subjected to the adverse action.

If the plaintiff meets the burden of presenting a *prima facie* case, a presumption of discriminatory intent arises. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). The burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the alleged discriminatory action. The defendant's burden is merely one of production, not proof. *Perryman v. Johnson Products Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983). Finally, if the defendant carries the burden, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the defendant were actually a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802-04. The burden never shifts but remains with the plaintiff at all times. *Burdine*, 450 U.S. at 253. The ultimate issue is whether the plaintiff has demonstrated that the defendant has intentionally discriminated against her. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993).

Defendant asserts, first, that it is entitled to summary judgment on plaintiff's disparate treatment claim because she cannot meet her initial burden of proving gender discrimination. In fact, plaintiff argues, without the support of any authority, that she "does not bear the burden to prove her case in response to a Motion for Summary Judgment." (Plaintiff's Brief, p. 2).

Hence, because the plaintiff has failed to demonstrate the existence of discrimination on the basis of sex by offering evidence of disparate treatment, her *prima facie* case must fail. As stated in the case of *Mitchell v. Carrier Corp.*, 954 F.Supp. 1576, 1580 (M.D.Ga. 1995), aff'd, 108 F.3d 343 (11th Cir. 1997), in order to overcome summary

judgment, the plaintiff bears the onus of proving by a preponderance of the evidence that a *prima facie* case of discrimination exists. In the instant case, the undersigned finds that the plaintiff has failed to meet this burden. Accordingly, the court recommends that the defendant's Motion for Summary Judgment be granted as to this claim.

Additionally, even if this court were to find that plaintiff has established a *prima facie* case of discrimination, she has failed to even attempt to demonstrate that plaintiff's proffered reasons for her dismissal were pretextual. It is clear from a review of the record that plaintiff's hiring creating an atmosphere of great discord and disharmony. More, it appears that this unhappy environment came as a result of plaintiff's refusal to work in a congenial environment with her co-workers. In fact, plaintiff responded to defendant's requests to resolve the problems by "going on strike." Thus, the court finds that the defendant has clearly met its burden of articulating a legitimate, non-discriminatory justification for plaintiff's termination. More, plaintiff has offered no facts to refute this showing. Instead, plaintiff offers the self serving conclusory statement that the defendant discriminated against her. However, without even an allegation of specific facts, plaintiff's case must fail.

Despite plaintiff's assertions, there is no evidence that the defendant terminated plaintiff's employment as a result of gender discrimination. To overcome defendants' showing, plaintiff must present "concrete evidence in the form of specific facts." *Earley*, 907 F.2d at 1081. As the Eleventh Circuit has explained:

> We have stressed before to district courts that, given the ease of pleading cases of discrimination, plaintiffs seeking to avoid summary judgment should be strictly held to the requirements of Rule 56(e); the plaintiff must present specific nonconclusory facts that would support a jury verdict against the particular defendant on discriminatory intent.

Ratliff v. DeKalb County, 62 F.3d 338, 341 (11th Cir. 1995). There are simply no facts to support such a jury verdict. Accordingly, defendant should be granted summary judgment on plaintiff's gender discrimination claim.

D. Plaintiff's Retaliation Claim

In her complaint, plaintiff also maintains that the defendant is liable under Title VII for retaliated against plaintiff for engaging in statutorily protected activity. In order to present a *prima facie* case of retaliation under Title VII, plaintiff must show that she was engaged in protected opposition to Title VII discrimination, that she was subjected to an adverse employment action, and that there was a causal link between his opposition and the adverse employment action. *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325, 1328 (5th Cir. 1980). *See also, Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491 (11th Cir. 1989); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598 (11th Cir. 1986); *Simmons v. Camden County Bd. of Education*, 757 F.2d 1187 (11th Cir. 1985), *cert. denied*, 474 U.S. 981, 106 S. Ct. 385, 88 L.Ed. 2d 338 (1985); *Hamm v. Members of Bd. of Regents*, 708 F.2d 647 (11th Cir. 1983). In order to demonstrate a causal link, the plaintiff must show that the person or persons who

allegedly retaliated were aware of the protected opposition. *McCollum v. Bolger*, 794 F.2d 602, 610 (11th Cir. 1986), *cert. denied* by *McCollum v. Tisch*, 479 U.S. 1034, 107 S. Ct. 883, 93 L.Ed. 2d 836 (1987).

Plaintiff alleges that the defendant retaliated against her because of her protected activity by discharging her. Conversely, defendant maintains that, although plaintiff may establish the first part of a *prima facie* case of retaliation, protected activity, she can not demonstrate the necessary causal link between his protected activity and any alleged adverse employment action.

Defendant maintains that plaintiff has failed to establish the requisite causal connection between her protected activity and the defendant's decision to terminate her employment. Defendant asserts that the mere timing of the two events is insufficient, without more, to establish pretext. As stated by the court in the case of *Robinson v. AFA Corp.*, 870 F.Supp. 1077, 1085 (N.D.Ga. 1994) (quoting *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir. 1987), if the timing of an action were all that was required to establish a proper nexus, "[t]hen a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well deserved discharge by merely filing, or threatening to file a discrimination complaint." In the present case, the court finds that the plaintiff has offered no evidence of a proper nexus aside from the temporal proximity between the two actions. This assertion, without more, must fail as a matter of law.

However, even if the court were to find that plaintiff has established a *prima facie* case of retaliation with

respect to the action of the defendant, the undersigned finds that defendant has articulated a legitimate justification for its employment action. Specifically, defendant has proffered legitimate personnel justifications warranting plaintiff's dismissal. As stated by the defendant, the Eleventh Circuit has recently held that in a mixed motive case involving retaliation, the employer prevails if it can demonstrate its legitimate reason for taking an adverse employment action would have induced the same action regardless of the plaintiff's protected activity. *Burrell v. Board of Trustees of Georgia Military College*, 125 F.3d 1390, 1395 (11th Cir. 1995).

Here, plaintiff has not and can not refute the necessity that motivated the defendant to take action. Instead, plaintiff's retaliatory discharge claim is based only upon her subjective opinion. This belief is insufficient to establish pretext. Accordingly, the undersigned finds that defendant's Motion for Summary Judgment should be GRANTED with respect to plaintiff's claim of retaliation under Title VII.

Conclusion

Accordingly, based on the foregoing reasons, the undersigned ORDERS that plaintiff's Motion to Respond to Defendant's Reply Brief be DENIED as it is in violation with the Local Rules of this court. Also based on the foregoing reasons, the undersigned RECOMMENDS that the defendant's Motion for Summary Judgment be GRANTED as to plaintiff's Federal Claims of gender, race and national origin discrimination, sexual harassment, and retaliation in violation of Title VII.

SO ORDERED and REPORTED AND RECOMMENDED, this 25th day of JANUARY, 1999.

/s/ John E. Dougherty
JOHN E. DOUGHERTY
UNITED STATES DISTRICT
JUDGE